

February 29th, 1764.

23

Unto the Right Honourable, the Lords of Council and Session,

T H E

P E T I T I O N

O F *Claim of Heirs-male* 22

Mary Campbell, only Daughter of the deceased Adam Campbell of Danna, and John Campbell of Otter, her Uncle, and nearest Friend upon the Mother's Side,

Humbly sheweth,

THAT, by Contract of Marriage betwixt the said ^{Nov. 3} Adam Campbell and Mrs. Jean Campbell, Daughter ^{and 5,} to Mr. John Campbell of Otter, the Estate of Danna ^{1747.} being provided only to the Heirs-male of the Marriage, the following Clause is insert for providing the Daughters, in the Event of the Succession falling to collateral Heirs-male: " In case there be no Heirs-male procreate and existing of this Marriage, the Time of the Dissolution thereof, and that there be one or more Daughters then existing thereof, in that Case the said Adam, with Consent of his Father, binds and obliges himself, and his other Heirs-male and of Tailzie, succeeding to him in the Lands above mentioned, to make Payment to the said Daughters, and Heirs-female of this Marriage, of the several Portions following; to wit, if there be but one Daughter, to her the Sum of 5000 Merks Scots Money, and if there be two, or more of them, to them 6000 Merks Money foresaid, to

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“ be distributed among them as the Father shall determine;
 “ by a Writing under his Hand, and in case of no such De-
 “ termination, it is to fall to them by equal Divisions; which
 “ Provisions the said *Adam Campbell* obligeth himself, and his
 “ abovenamed, to pay to the Daughters and Heirs-female of
 “ the Marriage, in case there be no Heirs-male thereof, that
 “ shall succeed him, at their respective Ages of twenty Years, or
 “ Marriage, under the Penalty of 100 *l. Scots* Money for each
 “ 1000 Merks of Patrimony, in case of Failzie, besides the
 “ Annualrents of the said Portions, so long as the same shall
 “ remain unpaid, after the Terms of Payment above writ-
 “ ten, and, in the mean time, to entertain and educate the
 “ said Daughters, and furnish them with all Necessaries a-
 “ greeable to their Station, till such Time as their Portions
 “ shall become due.”

The said *Adam Campbell* died in the Year 1750, and left
 two Children, a Son and a Daughter; his Son was served
 Heir to him, and died in 1754, by which the Succession of
 the Estate devolved to *John Campbell* her Uncle, Sheriff-clerk
 of *Argyll*, who has possessed the same ever since, under the
 Burden of the Liferent due to his Mother, and to his Bro-
 ther's Relict.

The Petitioner, now the only Child of her Father, after her
 Friends had, in vain, attempted to obtain, by amicable
 Means, an Aliment from her Uncle, who had succeeded to
 his Estate, was obliged to bring an Action, with Concurrence
 of Mr. *Campbell*, her Mother's Brother, wherein she concluded
 for Payment of her Provision of 5000 Merks, at the Terms
 specified in the Contract, and also for Payment of a reason-
 able Sum yearly, for her Aliment and Education, until the
 Portion should become due.

That the Lord Ordinary having made great Avisandum
 with the Libel and Writs produced, the Cause was called be-
 fore your Lordships upon the 17th Instant, and the following
 Interlocutor was pronounced: *The Lords having heard the*
State



State of the Process, and heard Parties Procurators thereon, they find the Pursuer not intitled to any Aliment from the Defender, in this Case, and therefore assilzie from the Conclusion of Aliment, and decern.

The Petitioner must humbly apply to your Lordships for Relief, in her present destitute Situation. Her Case cannot but appear to your Lordships extremely hard, that she should be exposed to absolute Want in her tender Years, while the Estate possessed by her Father devolves to a collateral Heir, to whom she would fall to be preferred in the Succession, both by the Course of Nature, and by the Rules established by the common Law of this Country. She will endeavour to show, that her present Claim to an alimentary Subsistence, is founded not only upon the express Clause in her Father's Contract of Marriage, but also, that a legal Claim would lie against his Heir, who succeeds to his Estate, although no Provision had been made for her by the Contract.

And, in the *first place*, with respect to the Clause in the Contract, tho' the first Part of it would seem to suppose the Condition of the Provision to be the Failure of Heirs-male at the Time of the Dissolution of the Marriage, yet when the whole of it is considered, it is hoped it will appear to be due, in case the Heir-male happened to fail before the Term of Payment of the Daughters Provisions, *viz.* their Age of 20 Years or Marriage; so it is expressly provided by the After-part of the Clause, which finishes and shuts up the Obligation on the Father, "Which Provisions the said *Adam Campbell* obliges himself and his above named, to pay to the Daughters, and Heirs-female of the Marriage, in case there be no Heirs-male thereof that shall succeed to him at their respective Ages of 20 Years or Marriage."

By this the Daughters Age of 20 or Marriage is made the Event upon which the Obligation is to take place, and the Condition of the Failure of Heirs-male is annexed to the same Event. If the Daughters die unmarried before that Age, nei-
ther

ther Principal nor Interest is due, *dies nec cedit nec venit*; and it will not be presumed, without the most exprefs Words, that the Condition of an Obligation is to be determined before he dies *cedit*, till which the Obligation itself cannot properly be said to exist. There was here an evident Reason for suspending the Condition of the Failure, as well as the Payment of the Portion, till the Daughter should attain to a reasonable Age; if their Brother lived to that Period, he would probably have it in his Power to provide them, or, if he did not, they might have some Benefit from his Executry arising from the Rents during so long a Possession; but there could be no Reason why the Daughters should be deprived of their Provision, because their Brother happened to survive the Dissolution of the Marriage, and thereafter died in Infancy, as in the present Case.

Had the Marriage dissolved by the Predecease of the Mother, leaving an infant Son, who had died in a short time after her, it could not be maintained, that, by this Accident, the Father would get free of the Provision, and even of the Obligation to aliment his Daughter, when the Heir-male was gone long before the Time that the Provision fell due; and the Rule of Construction must be the same in the present Case, when the Marriage dissolved by the Predecease of the Father. The Description, in the Beginning of the Clause, is merely exegetick, and is to be explained by the After-part of it, which declares the Provisions to be due to the Daughters, if there be no Heir-male of the Marriage, at their respective Ages of 20 Years or Marriage.

These and other Grounds, which will more fully occur to your Lordships, it is hoped, would be sufficient to satisfy you, that the Provisions, specified in the Contract, would be due to the Petitioner, if she shall attain to the Age therein limited: But as that is not the present Question, she will not trouble your Lordships with enlarging further on that Argument. It has been mentioned only to show, that an exprefs Obligation

is laid by the Contract upon the Father and his Heirs, to aliment and educate the Daughters of the Marriage during their tender Years, before they come to the Age, at which the Provisions, specified in the Contract, are made due and payable; and in so far as the Father is bound, by this Clause in the Contract, it cannot be doubted but his Brother, the Defender, who represents him, is also bound. The whole Obligations in the Contract do most certainly affect the Heirs of the Contracters as well as themselves.

But, in the *second place*, if it were supposed, that the Petitioner's Claim to the Provision, specified in the Contract, were liable to Exception, yet it does not appear that this can affect the Question anent the Aliment. If it was the Intention of Parties, that the Daughter, tho' intitled to a Provision at Majority or Marriage, should also be intitled to a suitable Allowance for Aliment and Education, in the mean time, before any Claim could arise to the Sum provided by the Contract, and while it was uncertain if it ever should be due or not, Can it be thought, that they would intend to deprive her of necessary Aliment and Subsistence, because the Condition had failed which gave her a Claim to the Portion? It would be natural, with Submission, to carry the Argument the contrary Way, and to give her the larger Aliment during her Minority, if she is wholly to be deprived of the Portion, that was thought suitable by the Parents to the Daughter of the Marriage, in case of the Estate going away to collateral Heirs-male.

This is agreeable to the Practice of the Court, and that in very late Cases, which will be within your Lordships Remembrance. In the Year 1757, an Action was brought against the present Duke of Gordon, at the Instance of Lord George and Lady Katharine Gordons, who were left unprovided by their Father. His Grace had left a Bond of Provision to the three eldest of his younger Children, 3000 *l.* to Lord William, 2000 *l.* to Lady Susan, and the like Sum to Lady Anne, pay-

able at their Marriages, with 100*l.* yearly to each, of Annuity, from their Father's Death. Your Lordships did, in that Case, modify 150*l.* yearly, of Aliment, to Lord *George*, and the like Sum to Lady *Katharine* yearly, from the Term of *Martinmas* 1752, being the first Term after their Father's Death, to the first Term of *Whitsunday* or *Martinmas*, after their attaining to the Age of seven Years compleat; and, from that Time, to their Age of fourteen, the Sum of 200*l.* *Sterling* yearly, and from that Age to their Majority, the Sum of 250*l.* *Sterling* yearly, to each of the Pursuers.

These periodical Allowances had been calculated, with a View, that their Tutors and Curators might, out of the Savings, over and above their necessary Aliment, raise Portions for them, nearly equal to what the Duke had left to their elder Brother and Sisters. And as the Duke had thought proper to appoint the Portions he left to these three, to return to his Heir, in case of their Decease in Minority, so your Lordships thought fit to add a like Provision to the Interlocutor, which, after specifying the particular Sums above mentioned, to be paid to the Children, during their respective Ages aforesaid, “ ordains the said Aliment to be paid to, and for the
 “ Use and Behoof of the said Children yearly, at two Terms
 “ in the Year, *Martinmas* and *Whitsunday*, by equal Portions,
 “ commencing the first Term's Payment at the Term of *Martinmas* 1752, and so forth thereafter, during the Periods
 “ aforesaid; but find, that in case of the Death of the said
 “ Lord *George* and Lady *Katharine Gordons*, or either of them,
 “ before their lawful Marriage and their attaining the respective Ages of twenty-one Years compleat, whichsoever
 “ of these two Events shall first happen, then, and in that
 “ Case, the Savings of the foresaid Aliment, that shall arise
 “ to the Child so deceasing, shall belong and return to the
 “ said Duke of *Gordon*, Defender, and his Heirs succeeding
 “ to him in his Estate, and shall not belong to the Executors
 “ of

“ of the said Lord *George* and Lady *Katharine Gordons*, and
 “ decerns accordingly.”

This Judgment, which was *unanimously* pronounced by your Lordships, is sufficient to shew the Opinion of the Court, that the Neglect of a Father to provide his Children, is no good Reason to deprive them of Aliment ; but, on the contrary, that it ought to be made up to them, by giving them a larger Aliment than would otherwise have been necessary, in order to supply, in some Degree, the Want of the Provisions which had been neglected to be left to them by their Father.

Let it be supposed, that the Petitioner's Brother had been still alive, in which Case she could have had no Claim to the Provision in the Contract, during his Life, as it was not intended to take place in that Event, yet, with great Submission, she cannot doubt, that your Lordships would have modified a reasonable Aliment to her, suitable to the Circumstances of the Estate, and that not less, but rather greater, than if she had been provided in a Portion. This could not have been founded upon the Clause in the Contract of Marriage, which is supposed in that Case not to take place, but upon the Obligation which lies upon every Father to aliment his Children during their Minority, and which, as it is a *legal*, as well as a *natural Obligation*, independent of any Writing, must transmit to his Heir who succeeds to his Estate.

And, if this Action would have been effectual against the Petitioner's Brother, who succeeded to the Estate *covenanted* to him by the *Contract* of Marriage, without any such Burden, it is not easy to conceive, why it should not have been effectual against her Father's *collateral Heir*, who succeeds to an Estate, which he had no Reason to expect, merely through the Accident of the Failure of the *heres prædilectus*, who was intitled to claim the Estate, as Creditor, in virtue of his Mother's Contract of Marriage.

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If such Misfortune had happened to the Noble Family, now mentioned, or any other, that the whole Male-descendants of the last Proprietor, had failed, and by the Investiture of the Estate, the Succession had devolved to collateral Heirs-male, the Petitioner does most humbly appeal to your Lordships, without any Argument, whether any Doubt would have been made, of modifying the same alimentary Annuities to be paid to the Daughters of the Family, by the *collateral Heir-male*, which the Court most justly modified to be paid to them by their Brother, the *nearest Heir* in the *direct Line*, and intitled by Law to be *preferred* to them in the Succession; whereas the *collateral Heir* is *postponed* to them by the *common Rules of Law*, as well as the *Order of Nature*, and only succeeds by the particular Tenor of the Investiture, which will never be understood to excecim him from the Obligation his Predecessor was under, to aliment his own Children.

The Argument urged from the Bar, in favour of the Defender, if the Petitioner rightly apprehended it, was as follows, " That in the Cases where Aliment has been found
 " due to Children by their Father's Heir, the Heir was also
 " Brother to the Children, and therefore was bound by the
 " Tie of Nature, to afford them Aliment in their Minority
 " and Nonage, when they were unable to act for themselves;
 " but, in the Case of a collateral Heir, the Tie of Nature
 " ceases; and, though he represents his Predecessor in the legal Obligations, yet the Representation takes no Place in
 " the Obligations which are purely natural, such as that of
 " alimenter Children."

It was also said, " That, in the present Case, the Estate is
 " very small, and is burdened with two Liferents, besides
 " some Debts; after which, there remains but an inconsiderable
 " Residue to the Heir, which can hardly admit of the
 " Burden of an Aliment to be modified in favour of any other Person whatever."

But

But the Extent of the Estate does not properly enter into the present Question. When Aliment is found due, your Lordships will direct an Enquiry to be made into the Extent of the Estate, and the Burdens affecting it, and modify such Sum as shall appear to you to be suitable to the free Residue. The present Question is, Whether it is a good Defence against giving any Aliment to the Daughter of the last Proprietor, that the Heir who represents her Father, is not joined to her by so near a Tye of Blood as could entitle her to claim an Aliment from him *ex jure nature*? Or, in other Words, Whether the numerous Tract of Decisions, by which Heirs have been found liable to aliment the Children of their Predecessors have been founded upon the Tye of Blood, which these Heirs were under to their Brothers and Sisters; or if they had been founded upon the *Obligation* they were under, as *representing* the Father of the Children whose Estate they enjoyed.

Upon this Point, it is hoped, your Lordships will have no Difficulty, after considering the Opinions of the learned Authors who have wrote upon this Subject, with the apparent Reasons of the Decisions, that have been pronounced by the Court, in Cases of this Kind.

Lord *Stair*, who has collected many Cases that were decided in his Time, in which the Court modified Aliments, to be paid to the Children of a Proprietor of Lands, after his Death, appears to have been of Opinion, that the Action for Aliment lay against the Heir, as representing his Predecessor, by possessing his Estate. Thus in the Title Succession § 29. Stair, Lib. 3. Tit. 4. Sect. 29. P. 426. Edinburgh, 1693. after speaking of Provisions, granted by Fathers to their Children on Death-bed, he adds, "And now since the Lords have frequently decerned *Aliment* to *Bairns* against the *Fa-*
thers Heirs, having competent Estates, it is like the Lords will allow all Provisions on Death-bed, in so far as they may be competent Aliments." The Author here makes no Distinction, whether the Father's Heir was Brother to the

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Children or not; all that he requires is, that he represent the Father, and possess an Estate sufficient to afford an Aliment to the Children of the deceased Proprietor, who was bound to aliment them.

And in a later Institute of the Law, wrote by a learned Author, who had Occasion to observe the Practice of the Court with great Attention, for a long Tract of Years, the same Doctrine is very expresly and distinctly laid down.

Lord Bank-
ton's Inflitutes, Book 1.
Tit. 6. Sect.
16. Vol. I. p.
156.

“ The Representatives of the Father and Mother, are likewise liable to the Aliment of the Children, first those of the Father, and in default of them, the Representatives of the Mother; for the *Obligation* to maintain the Children being *inforced* by the *civil Sanction*, founds *Action* against the *Parents*, which *descends* upon their *Representatives*, and is equally good against them, as *other Obligations* are: But the *Obligation* to aliment, is only during the *Minority*, or other *Incapacity* of the Persons to support themselves.”

And the same Rule is again laid down by the Author, when he is treating of the *Action* that lies against Brothers to aliment their Brothers or Sisters, if poor and indigent, and how far the same is enforced by the Law of this Country.

Page 153.
Sect. 6.

“ As the Sentiments of Nature strongly suggested, so by the Civil Law of the *Romans*, Brothers and Sisters are bound to support one another when become poor: But we seem not to have enforced any such *Action* by the Civil Law with us. Where the Brother is *Heir* to his *Father*, and the other Children *Minors*, altogether unprovided, or otherwise incapable to sustain themselves, or till the Time their Provisions bear Interest, he, as any other *Heir*, is liable to maintain them according to the Condition of the Children and Circumstances of the Estate, devolving on him, as was above-mentioned.”

And that the Judgment of these learned Authors is well supported by the Practice of the Court, will appear to your

Lordships

Lordships from taking a short Review of the chief Decisions that have been given in such Cases.

Lord *Stair* observes a Case as follows : “ The umquhile ^{January 8, 1663.} *Laird of Otter*, by his Contract of Marriage, having provided his Estate to his *Heir-male*, provided 5000 Merks to ^{contra Laird of Otter.} his eldest *Heir-female*, when she should be capable of Marriage, and an Occasion offered, whereupon the *Heir-female*’s Mother pursues the *Heir-male* for Payment of the Sum, and for Payment of an Aliment to the *Heir-female*, during the Time she had been with her Mother, and in Time coming, till the Provision be paid. The Defender alledged the Libel is noways relevant for Aliment, he not being obliged, by the Contract, for any Aliment, but only for the Sum at such a Time ; neither is there any Annual-rent due for the Provision till the Term of Payment.”

In this Case, the Lords found Aliment due to the Daughter of the last Proprietor, by the collateral *Heir-male*, who succeeded to her Father’s Estate, though there was no Provision for Aliment in the Contract, and her Portion did not bear Annualrent before her Marriage. The Case is precisely the same with the present, in every Circumstance but one, that probably the Estate was larger in that Case than it is here, which, though it may have Influence on the Modification of the Aliment, yet surely could make no Variation in the Judgment, in Point of Law, whether Aliment is due by a collateral *Heir-male* to his Predecessor’s Children, or not.

Many Cases are observed by the same noble Author, in his Collection, where Aliment has been found due by the eldest Brother, who possessed his Father’s Estate. The Petitioner shall only mention such as point out most clearly the *ratio decidendi* on which the Judgment of the Court proceeded.

The first Case, in Lord *Stair*’s *second Volume*, is an Action ^{Novemb. 10, 1671.} at the Instance of the Relict of one *Hastie*, a Stabler in *Edinburgh*, against his eldest Son, who had got a Disposition from ^{Hastie and Ker his Mother, contra Hastie.} his Father to his Effects, for Aliment to a posthumous Son, which

which she had born to his Father after his Death. The Defender alledged, " That though Parents be obliged to aliment their Children, yet there is neither Law nor Custom obliging a Brother to aliment his Brothers, especially where the Brother does not represent the Father." It was answered, " The Libel is not founded on the Brother's Obligement, but upon the Father's Obligement, whom the Brother represents by the foresaid Disposition."

The Defender answered, " That the Father's Obligation to aliment his Children, is personal, *et non transit ad hæredes*."

The Lords found " The Defender, as representing his Father, by the Disposition of his Goods, liable to aliment this posthumous Child during his Minority, at least so long of his Minority, as he was without Calling or Means to aliment himself, but would not extend it after his Majority."

Here the Grounds of Law are discussed with Precision, and the Brother is found liable, not upon any Obligation he was under, *ex jure naturæ*, but upon the Obligation his Father was under to aliment his Children, which was found not to die with the Father, but to transmit to his Representatives, as laid down in the Authorities already mentioned.

July 5, 1677,
and Jan. 21,
1679, Strai-
tons contra
Laird of Low-
riefton.

Another Case occurred, where the Laird of Lowriefton had married his Servant-maid, after she had born him two Children, and gave them Provisions, payable at their Ages of fifteen or Marriage, but there was no Obligation for Aliment or Annualrent before that Age. In this Case, though not favourable, the Lords sustained the Claim of Aliment against the Father's Son of the first Marriage, who possessed his Estate.

Dirleton, 5th
July 1676.
Chisley contra
Edgar of
Wadderly.

Another Decision is observed by Lord Dirleton, where the Lords found, " That the second Brother having no other Means nor Provision, his eldest Brother, who was Heir to his Father, and had the Estate, ought to entertain him and put him to a Calling."

And

And the later Decisions of the Court have gone entirely upon the same Plan. It would waste too much of your Lordships Time to enumerate them all; but your Lordships will remember a very *solemn* Decision, which was *unanimously* pronounced in the Case of Sir *William Douglas's* Children, who pursued Sir *John*, their elder Brother, for Payment of Sums in name of Aliment, being left unprovided by their Father. Sir *John* insisted, that Lady *Douglas*, their Mother, ought to be liable before him, and that she was very able to aliment them, as she was possessed not only of a Jointure, secured to her out of his Estate, but also of a separate Estate, which belonged to herself in Property, to the amount of 150 *l. Sterling* yearly Rent. *The Lords found the Defender, Sir John Douglas, having succeeded to his Father in a considerable Estate, is primarily liable to aliment his younger Brothers and Sisters unprovided.*

February 8th,
1739. Helen,
Archibald,
&c. Douglasses
against Sir
John Douglas
of Killhead,
No. 114.

If the Action had been sustained against Sir *John*, as Brother, *super jure nature*, Lady *Douglas*, the Mother of the Pursuers, would have been found liable before him, as she was possessed of a large Estate of her own, in Property, besides, the Jointure she was secured in out of her Husband's Estate. But your Lordships were of opinion, that the Mother, tho' extremely able to aliment her own Children, could not in Law be made liable, as long as the Father had a Representative who was possessed of his Estate, and able to discharge the Obligation that was primarily incumbent on him.

This Decision is a full Confirmation of the former Authorities and Precedents by which it is established, that the elder Brother is liable, not in respect of the Tye of Blood, but in respect of the *Representation* of his *Father*, to whom he succeeds in his Estate, and, of consequence, the *collateral Heir-male* must also be liable upon the same Ground.

And indeed, it seems impossible to doubt of this, when it is observed, that, in Cases where Actions have been brought for Aliment, against a Brother who did not represent his Fa-

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ther,

January 25th,
1754. Margaret
Anderson
and Rachel
Gibson against
James Gibson
and his Curators,
Faculty
Collection,
No. 97.

her, your Lordships have never found such Aliment due; so it was decided in the Case referred to on the Margin, and several other late Cases, which will be within your Lordships Remembrance.

Upon a Review of the above Precedents and Authorities, the Petitioner is humbly persuaded, that your Lordships will be satisfied, that the Obligation which lies upon the Father to aliment his own Children during their Minority, does transmit to his Representatives, who succeed to him in his Estate and Effects: That, in Cases where the eldest Brother has been found liable, which is the Event that most commonly occurs, the Action has been sustained, not upon any Obligation lying upon him personally, *super jure naturæ*, but only upon the Father's Obligation, which transmits to his Heir a long with the Succession, and makes him liable before the Mother, even where she has a large Estate of her own, out of which she is sufficiently able to provide for her Children.

And as the Action is sustained against the Brother, in respect of his Representation of the Father of the Children, it must be sustained *a fortiori* against a collateral Heir, who succeeds to an Estate to which the Daughter ought to have succeeded as Heir of Line, and could have had no Title to it, if the legal Succession had not been interrupted. And accordingly such Action has also been sustained by the Court against *collateral Heirs*, although the Father had come under *no written Obligation* for that Purpose. The *natural Obligation* which lies *primarily* upon the Father, is *inforced* by the *Civil Sanction*, as the Law-books speak, and descends against his Representatives along with his other Obligations.

And as to what was said, that the Petitioner's Mother ought to be liable in this Case, who possesses a Liferent out of the Defender's Estate. This is directly contrary to the uniform Tract of Precedents above referred to, where the Heirs, whether descended or collateral, have always been found

found liable before the Mother, and that although she had not only a Liferent, but also a separate Property of her own, as in the Case of Lady *Douglas*; and in the present Case the Mother's Liferent is no more than 500 Merks, which belongs to her Husband; and it is believed no Instance will be condescended on, where a Mother's second Husband has been found liable to relieve the Father's Heir of the Obligation incumbent on him, to aliment the Children of his Predecessor, whose Estate he enjoys *titulo representationis*.

MAY it therefore please your Lordships, to review the said Interlocutor; and to find, that the Defender, who has succeeded as Heir-male to the Petitioner's Father, and possesses his Estate, is liable to aliment the Petitioner, until she attain to the Age of 20 Years, or be married; & to remit to the Lord Ordinary in the Cause, to hear Parties upon the Extent of the Estate, and the Burdens affecting the same, and to modify a suitable Sum for the Petitioner's Aliment.

According to Justice, &c.

JAMES FERGUSON.

